

From: Quinones, Edwin
To: ["John McCoy"; Matt Rosek](#)
Cc: [Hayes, Mark](#)
Subject: RE: West Fertilizer Site - Consent for Access
Date: Friday, June 21, 2013 2:31:00 PM
Attachments: [West 3rd Draft Consent for Access for Sampling and Environmental Investigation 6-21-13.docx](#)

Mr. McCoy,

Sorry I missed your call earlier. I'm including a 3rd draft to reflect our understanding of a 48-hour prior notice and an "emergency" provision otherwise. For the emergency condition, I've included the CERCLA/Superfund phrase of art known as "imminent and substantial endangerment" (aka, "ISE"), which is found in Section 106(a) of CERCLA, 42 U.S.C. 9606(a). I trust this 3rd draft addresses both our issues concerning EPA's access and response authority and the spoliation issues Matt explained earlier. If so, please have an authorized representative sign it by Monday, June 24. For your convenience, you can fax or e-mail me or Mark Hayes a PDF copy of the signed Consent for Access. Mark's e-mail address is hayes.mark@epa.gov.

Thanks and best regards,

Ed Quinones
Assistant Regional Counsel
U.S. EPA Region 6, 6RC-S
1445 Ross Ave.
Dallas, TX 75202
214-665-8035
214-665-6460 fax

From: John McCoy [<mailto:jmccoy@mllaw.com>]
Sent: Friday, June 21, 2013 2:12 PM
To: Quinones, Edwin; Matt Rosek
Cc: Hayes, Mark
Subject: RE: West Fertilizer Site - Consent for Access

Mr. Quinones,

I am agreeable to a 487 hour notice provision.

I am agreeable to a caveat for "emergency scenario". Recommended language could be: In the event of an emergency it is understood that EPA may take immediate action. In this event, EPA will attempt to provide notice of its activities as quickly as is reasonably possible.

JOhn

John V. McCoy
McCoy Leavitt Laskey LLC
Riverwood Corporate Center III
N19 W24200 Riverwood Drive
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From: John McCoy
Sent: Friday, June 21, 2013 1:22 PM
To: 'Quinones, Edwin'; Matt Rosek
Cc: Hayes, Mark
Subject: RE: West Fertilizer Site - Consent for Access

Mr. Quinones,

I just left you a VM about the Consent for Access agreement.

The new version I in essence something we would be willing to execute if you could give us 72 hours notice (perhaps even 48 hours).

Given the various "interested parties" we need to give all of them reasonable notice when someone is going to be on site so they can have the opportunity to attend or raise legal objection.

If you would like to discuss this requested accommodation to the Consent to Access you can reach me at my direct line listed below.

Next week I will be in West and may be reached via e-mail and on my cell. 262.951.1221.

Thanks,

John

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From: Quinones, Edwin [<mailto:quinones.edwin@epa.gov>]
Sent: Thursday, June 20, 2013 5:14 PM
To: Matt Rosek
Cc: John McCoy; Hayes, Mark
Subject: RE: West Fertilizer Site - Consent for Access

Matt,

I appreciate your explaining the spoliation issues more clearly during our phone call this afternoon. I've spoken with our On-Scene Coordinator, Mark Hayes, and at this point in time, EPA intends only to do air monitoring/sampling and oversight of the cleanup, with TCEQ taking the lead on cleanup. I'm including a 2nd draft Consent for Access that reflects this and which hopefully allays or leaves moot any spoliation issues that may have arisen with soil sampling, which we are not seeking at this time. If it looks like the EPA will need to take soil samples, however, I will let you know and we can address that issue at that time.

If this 2nd draft Consent for Access is acceptable, please have an authorized representative sign it by next Monday, June 24. You can return a signed copy to me or Mark Hayes by fax or e-mail if that is more convenient. Mark's e-mail address is Hayes.Mark@epa.gov.

Again, please call or e-mail me if you have any other questions or concerns.

Ed Quinones
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From: Matt Rosek [<mailto:mrosek@mlllaw.com>]
Sent: Thursday, June 13, 2013 4:33 PM
To: Quinones, Edwin
Cc: John McCoy
Subject: RE: West Fertilizer Site - Consent for Access

Edwin,

Thank you for the email and attachment. I will review this with John McCoy and one of us will get back to you shortly.

Matthew R. Rosek-Partner
McCOY LEAVITT LASKEY LLC
mrosek@mlllaw.com
262-522-7022

From: Quinones, Edwin [<mailto:quinones.edwin@epa.gov>]

Sent: Wednesday, June 12, 2013 8:45 PM

To: Matt Rosek

Cc: John McCoy; Hayes, Mark

Subject: West Fertilizer Site - Consent for Access

Matt:

It was a pleasure speaking with you this afternoon. As you requested, I'm attaching a Consent for Access based on one of our standard forms for seeking entry to perform an environmental site inspection and investigation, such as sampling, drilling, etc., pursuant to EPA's authority under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, aka Superfund). The specific statutory provision authorizing entry can be found at Section 104(e), 42 U.S.C. 9604(e). We normally seek voluntary access in the form of a Consent for Access instead of seeking a warrant or an Administrative Order for Access, and this particular Consent for Access is limited to those sampling and investigative measures the EPA usually undertakes at Superfund sites. Although we don't negotiate access given EPA's statutory authority, I certainly understand the issues you've raised concerning third party interests with respect to evidence and spoliation. For this reason, I've included language in the attached Consent for Access that calls for at least 24 hours' notice prior to the EPA or its representatives (such as contractors) seeking entry to the site for the purposes described.

If you don't have any concerns with the Consent for Access, please have your client, or whomever has been designated authority to grant access, sign the Consent for Access and have it returned to me. If it's more convenient, you can also e-mail me a scanned PDF copy of the Consent for Access.

Otherwise, please feel free to call or e-mail me if you have any questions.

Regards,

Ed Quinones
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U.S. EPA Region 6, 6RC-S
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